

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-024712

03/28/2012

HON. JOHN R. DITSWORTH

CLERK OF THE COURT
M. Brady
Deputy

SUNRISE BANK OF ARIZONA

DAVID LEE ALLEN

v.

BUILDING DEVELOPMENT SYSTEM L P, et al. MELANIE G MCBRIDE

UNDER ADVISEMENT RULING

The Plaintiff/Counterdefendant is Sunrise Bank.

The Defendant/Counterclaimants are: Building Development System (BDS) and six (6) individual partners; the defendant General Partner is Lance Herndon whose background involve training as an Attorney, and working as a banker and builder, Defendant Thomas Ford is a plumbing contractor, Fred James is a Realtor, Defendant Eric Nichols was an air conditioning contractor and Defendant Ray Palmer was also in the air handling business.

The Plaintiff's claims are:

1. Breach of Contract – Breach of the Loan documents.
2. Judicial Foreclosure of the property.

The Defendant Counterclaimants have seven (7) remaining causes of action, which are:

1. Breach;
2. Unconscionability / Impossibility;

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3. Impracticability/Impossibility;
4. Constructive Fraud;
5. Breach of Good Faith and Fair Dealing – Both contract;
6. Intentional and Negligent Misrepresentation;
7. Anticipatory Repudiation

Over the course of three weeks, the Court held a bench trial and heard from a number of witnesses.

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

A request was made by both parties for the Court to make findings of fact and conclusions of law.

The Court then ordered that the parties provide their own draft Findings of Fact and Conclusions of Law for the Courts consideration.

The parties agreed upon a date to provide those pleadings and in addition, stipulated to the provision of written closing arguments to be submitted in conjunction with their proposed findings of fact and conclusions of law.

The Court has now received both sets of documents from the parties.

The Court accepts and adopts in full, those findings of fact and conclusions of law proffered by Plaintiff Sunrise Bank.

In addition to the above, the Court further finds the following:

1. Defendants BDS breached first.
2. That there was an initial shortfall in the construction budget of \$97,342.00.
3. The Court finds that as of March 26, the BDS defendants were aware of this shortfall in the construction budget.
4. The Court finds that Exhibit 12 (Letter from Mr. Payok) dated August 20, is the first notice of actual default.

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5. The Court finds that Default conditions can exist without having the bank actually defaulting the borrowers.
6. The Court finds that the BDS borrowers were as a group, sophisticated borrowers with a good working knowledge of construction lending.
7. The Court finds that the BDS borrowers had a reasonable amount of time in which to make up this shortfall as there was nearly a six month period in which the bank and borrowers attempted to negotiate a compromise over this loan.
8. That the BDS defendants failed to satisfy the prudent demands of Sunrise Bank to either make up the shortfall through individual partnership contributions or trim the budget to fit the loan.
9. The Court finds that the primary cause of this litigation was the BDS Defendant's failure to timely understand the tectonic shifts in the financial markets at the time that they were beginning their project. This should have become apparent first and foremost; the court notes that Sunrise Bank of Arizona was not the original lender on the project. It was the second, and the reason that the BDS Defendants had to seek them out was because the original lender (according to the testimony of defendant Lance Herndon on January 30, 2012) "Arizona Business bank was pulling in its horns and had concerns with the economy." CD 1/30/2012 @ 9:57:09. Mr. Herndon later told the court was told that Arizona Business Bank was getting out of the construction lending business. Mr. Herndon 1/30/12 at 1:52:36.

As stated previously, the Court accepts and adopts the Findings and Fact and Conclusions of Law proffered by Plaintiff Sunrise Bank.

The Court finds that the Plaintiff has met their burden of proof.

The Court finds that the Defendant/Counterclaimants have failed to meet their burden of proof.

THEREFORE, the Court being fully advised, and good cause appearing,

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IT IS ORDERED that Plaintiff is entitled to entry of judgment, as follows:

Plaintiff's Complaint

1. Entering Judgment in favor of Plaintiff on Counts 1 and 2 of its Complaint.
2. Awarding Plaintiff the principal amount of \$994,897.67, with interest accruing thereon from March 1, 2012 until paid in full at the contract default rate of 9.25% per annum.
3. The Deed of Trust described in Plaintiff's Complaint and executed by Defendants on January 8, 2008, and recorded in the office of the Maricopa County Recorder on the January 11, 2008 at Instrument Number 2008-0028253, is a valid and enforceable superior lien securing all of the sums set forth above owing to Plaintiff upon the following described real property located in Maricopa County, Arizona:

Parcel No. 1:

Lot 12, OF ANTHEM COMMERCE PARK 33.2, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 537 of Maps, page 26.

Parcel No. 2:

Lot 13, OF ANTHEM COMMERCE PARK 33-2, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 537 of Maps, page 26.

4. Plaintiff is the lawful owner and holder of the Deed of Trust and the Note secured by it.
5. The Deed of Trust is foreclosed and that special execution is issued in this action to the Sheriff of Maricopa County, Arizona, directing that office to seize and sell the aforesaid Property as under execution, according to the law and the practice of this court. Out of the proceeds of that sale, first shall be paid the costs and expenses of the sale. The Plaintiff shall next be paid an amount sufficient to pay the sums due under this Judgment. Any excess shall be paid into Court for disbursal according to further order of this Court. All sums to be paid shall be in

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lawful money of the United States. If the property is not redeemed within thirty (30) days after the date of Sheriff's Sale, and no notice by a subsequent lienholder has been filed in accordance with the provisions of A.R.S. §12-1284, the Sheriff shall then promptly deed the Property to the purchaser at the Sheriff's Sale.

6. If the Property fails to sell for a sum sufficient to satisfy the amount owed to Plaintiff under these Findings, then Plaintiff may satisfy the deficiency out of other property or assets of each of the Defendants.
7. The Plaintiff may purchase the Property at the Sheriff's Sale by applying all or any portion of the indebtedness evidenced by these Findings toward the purchase price.
8. The Defendants, and the unknown heirs and devisees of any deceased defendant, any person claiming through or under them; any persons whose right, title, claim, interest, estate, or lien in, to, or upon the property was acquired after the recording of said lien; or any person having actual knowledge of the lien, after the execution and delivery of the lien, is after the statutory period of redemption hereby forever barred and foreclosed from any and all right, title, claim, interest, estate or equity or other right of redemption in, to, and upon the property and every part and parcel of it.
9. The purchaser of the Property at the sale shall be allowed to take possession of it. Any parties to this action, their successors-in-interest, or a party taking possession of the Property or any part of the Property, at a time subsequent to the recording of the Lis Pendens, shall deliver possession of the Property to the purchaser upon production of the Sheriff's Deed. If possession is denied to the purchaser, then there shall issue without further order of the court, a Writ of Possession directing the Sheriff to place the purchaser or his assigns in possession.

Defendants' Counterclaim

10. Entering Judgment in favor of Plaintiff on all remaining Counts of Defendants' Counterclaim.

Pursuant to A.R.S. § 12-341, the Plaintiff Sunrise Bank of Arizona is also awarded their attorney's fees and costs and they are ordered to submit an application for attorney's fees and costs.

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IT IS ORDERED that the Plaintiffs shall file a formal Judgment for the Court.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.